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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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# BRIEF FOR MASSACHUSETTS, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, NEBRASKA, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, PUERTO RICO, TEXAS, VERMONT, THE VIRGIN ISLANDS, AND WASHINGTON AS AMICI CURIAE URGING REVERSAL

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The Attorneys General of Massachusetts, Arizona, Connecticut, Delaware, Florida, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Puerto Rico, Texas, Vermont, the Virgin Islands, and Washington submit this brief amici curiae in support of the petitioners International Union et al., urging this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

## INTERESTS OF AMICI CURIAE

The amici states joining in this brief have a number of compelling interests that are threatened by the broadly exclusionary "fetal protection" policy at issue in this case. First, the states have a strong interest in equal employment opportunity and in the right of their female, as well as male, citizens to participate in the

workforce free from gender-based discrimination. The states' interest in freedom from employment discrimination based on sex is reflected in state antidiscrimination laws,[1/] which are frequently enforced to provide more protection for employees than do the cognate provisions of federal law.[2/]

The states have a particular interest in remedying the economic problems related to gender discrimination: the continuing wage

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1/ E.g., Mass. Gen. L. ch. 151B (1988); Mass. Gen. L. ch. 149, §105D (1988); Mass. Const. pt. I, art. I; Mich. Comp. Laws Ann §37.201 (West 1985 & Supp. 1990); Minn. Stat. ch. 363 (1988); N.Y.S. Exec. Law §296 (McKinney 1982 & Supp. 1990).

2/ See, e.g., Cal. Fed. Sav. & Loan v. Guerra, 479 U.S. 272 (1987); Mass. Electric Co. v. Mass. Comm'n Against

(footnote continued)



gap between male and female workers, and the poverty of many female-headed households. The exclusion of women from decent-paying jobs makes families (especially those that are female-headed) poorer, which in turn has a host of adverse health as well as financial consequences.

The majority of women are in the national workforce, and their numbers are increasing,[3/] yet despite

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(footnote continued)

Discrimination, 375 Mass. 160, 375 N.E.2d 1192 (1978); Lynn Teachers Union, Local 1037 v. Mass. Comm'n Against Discrimination, 406 Mass. 515, 549 N.E.2d 94 (1990); People v. N.Y.C. Transit Authority, 59 N.Y.2d 343 (1983); Farmington Educ. Assoc. v. Farmington School Dist, 133 Mich. App. 566, 351 N.W.2d 242 (1984); Michigan Dep't of Civil Rights v. Michigan Dep't of Civil Service, 101 Mich. App. 295, 301 N.W.2d 12 (1980), app. denied 411 Mich. 1034 (1981).

3/ As of 1988, 56.6 percent of all

(footnote continued)

antidiscrimination laws, women continue to suffer from a substantial wage gap. Wages of women are far lower than those of men in virtually every employment category.[4/] Because of this wage differential, female-headed households face particular difficulties. One third of the individuals living in female-headed families are poor, and female-headed families are four times as likely as other families to be

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(footnote continued)

women age 16 or older were in the labor force. The American Woman 1990-1991 app. at 376, table 14 (S. Rix ed., for the Women's Research and Education Institute 1990) [hereinafter WREI report]. The labor force participation of women between the ages of 20 and 44 (the primary reproductive years) ranged from 73 to 75% in 1988. Id., app. at 377, fig. 5.

4/ Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the

(footnote continued)



living in poverty. [5/]

One of the causes of this overall wage differential is that women have traditionally been excluded from higher-paying blue-collar jobs. This is changing only slightly, and women are still paid less than men even while working in traditionally male jobs.[6/]

Of significant concern to the

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(footnote continued)

United States (109th ed. 1989) at 406, Table 666 [hereinafter Statistical Abstract]. The median annual income of women working full time in 1986 was only 65% of the median annual income of men working full time. WREI report, supra note 3, app. at 390, fig. 10. In 1987, women constituted 65% of all hourly workers making at or below minimum wage. Statistical Abstract, supra at 411, table 675.

5/ WREI report, supra note 3, app. at 363, 396, table 31.

6/ For example, in 1988, only 1.4% of employed women worked in the construction industry, in contrast to

(footnote continued)

states is that exclusion of women from certain jobs, particularly those providing relatively high wages and good benefits, will have negative long-term effects on public health and particularly on the health of children.[7] Many women forced into unemployment or lower-strata jobs can be expected to lose employer-provided health insurance. Underemployment also plays a significant role in determining

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(footnote continued)

10.9% of employed men. WREI report, supra note 3, app. at 385, fig. 9. Data for women's wages in construction are not available because of the small sample size, but for the "precision production" category, which includes construction trades, in 1987 the median weekly earnings of men were $431, while women's median weekly earnings were $302. Statistical Abstract, supra note 4 at 406, table 666.

7/ The National Center for Children in Poverty recently reported that "in

(footnote continued)



a person's likelihood of being insured.[8]

With a loss of health insurance, the well-documented negative health effects of unemployment, low wages and poverty can only be exacerbated. Unemployment is related to a number of adverse health outcomes, including increased rates of death, suicide, and

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(footnote continued)

1985, 1.5 million poor children under six - 30 percent - were not eligible for Medicaid and were not covered by any other type of health insurance. In addition, nearly 1 million near-poor children under six - 32 percent - lacked health insurance coverage from any source." National Center for Children in Poverty, School of Public Health, Columbia University, Five Million Children, A Statistical Profile of Our Poorest Young Citizens 64 (1990)[hereinafter Five Million Children]. See generally, Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1230-1232 (1986).

8/ In 1986, 24.4% of full-time employees working throughout the year

admissions to mental hospitals.[9/] Indeed, most infant morbidity and mortality in the United States is linked to premature birth and low birthweight. These factors in turn are strongly associated with poverty and inadequate prenatal care.[10/]

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(footnote continued)

lacked health insurance, while 75% of part-time employees working throughout the year lacked health insurance. 88.7% of part-time workers who worked only part of the year had no health insurance. Congressional Research Service, Library of Congress, Health Insurance and the Uninsured: Background Data and Analysis 97 (1988).

9/ House and Senate Joint Econ. Comm., Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong., 2d. Sess. 2-5 (1984).

10/ Binsacca, Ellis, Martin & Petitti, Factors Associated With Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also, Rush, Socioeconomic Status and

(footnote continued)



Thus, a policy like Johnson Controls', which deprives virtually all women of access to a broad range of relatively high-paying, secure, unionized jobs, not only undermines the states' concerns for equal employment opportunity but exacerbates the continuing effects of gender disparities in the workforce: lower

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(footnote continued)

Perinatal Outcome, in Prenatal Intensive Care 14-17 (S. Adajem & A. Brown eds. 1977) (discussing striking relationship between changes in the unemployment rate and changes in infant mortality rate); Meyerowitz & Lipkin, Psychosocial Aspects, in Prevention of Embryonic, Fetal, and Perinatal Disease 263, 267 (R. L. Brent & M. I. Harris eds. 1976) (discussing correlation between adverse economic, social and family circumstances for the pregnant woman and pregnancy complications, prematurity, low birth weight and subsequent developmental problems for their infants); Chez, Haire, Quilligan & Wingate, High-Risk Pregnancies: Obstetrical and Prenatal Factors, in

(footnote continued)

wages, poverty, underinsurance, and poor health.

The amici states also have an interest in removing health hazards from the workplace. This interest is recognized in the Occupational Safety and Health Act, which "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws ..." 29 U.S.C. §651(b)(11). The Act reserves power to the states over "any occupational safety or health issue with respect to which no federal standard is in effect..." 29 U.S.C. §667(a). Under

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(footnote continued)

Prevention of Embryonic, Fetal, and Perinatal Disease, supra at 70-72 (discussing correlations between socioeconomic status and successful pregnancies, and between health care and successful pregnancies).



this section states are free to adopt standards more stringent than those promulgated by the Occupational Safety and Health Administration ("OSHA") if their effect is to protect the health and safety of the public.[11/] The Act also permits states to submit plans to develop and enforce occupational safety and health standards where OSHA standards are already in effect, provided that such plans are "at least as effective" as OSHA standards. 29

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11/ Assoc. Indus. of Mass. v. Snow, 898 F.2d 272 (1st Cir. 1990). See also, Envtl. Encapsulating Corp. v. New York City, 855 F.2d 48 (2d Cir. 1988)(state asbestos regulations are not expressly preempted by OSHA because they have a legitimate and substantial purpose of promoting public safety and health).

U.S.C. §667(b),(c)(2).[12/]

Given the states' strong interest in and responsibility for workplace health and safety, they are gravely concerned about the widespread nature of occupational health hazards, the costs of resulting occupational disease, and the ways in which a "fetal protection" policy like Johnson Controls' ignores dangers to the male reproductive system and in fact may act as a disincentive to cleaning up workplaces.

Health problems caused by workers' exposure to harmful substances are widespread. OSHA estimates that more

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12/ There are 23 OSHA-approved state plans to develop and enforce occupational safety and health standards. 29 C.F.R. § 1952 (1989). These states have effectively assumed all responsibility for ensuring safe and healthy work environments for their citizens.



than 21 million employees are potentially exposed to hazardous substances in the workplace and that more than 4 1/2 million of them are exposed above the limits set by OSHA.[13/] The result of these exposures is widespread occupational disease, from which an estimated 100,000 people die annually nationwide.[14/] The national rate of occupational illness reported by the U.S. Department of Labor in 1985 was 10 per every 10,000 workers; the national

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13/ Preamble to OSHA Final Rule Revising Workplace Air Contaminant Limits, 54 Fed. Reg. 2781, 2725 (January 19, 1989) [hereinafter OSHA Final Rule].

14/ Office of Technology Assessment, U.S. Congress, Preventing Illness and Injury in the Workplace, OTA-H-256 37(1985). An estimated 10 percent of all deaths from cancer, for example, have an occupational origin. OSHA Final Rule, supra note 13, at 2781.

rate just one year later was 19 per every 10,000 workers.[15/]

Reproductive health hazards, the particular focus of Johnson Controls' policy, are particularly widespread. According to federal estimates, more than 14 million workers are potentially exposed each year to known or suspected reproductive hazards on the job. Reproductive disorders are among the ten leading work-related disorders in

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15/ Bureau of Labor Statistics, U.S. Dep't. of Labor, Occupational Injuries and Illnesses in the United States by Industry 1986, Bulletin 2308 p. 5 (1988). In Massachusetts alone, an estimated 4,000 new cases of work-related illness were diagnosed and reported in 1987. Massachusetts Interagency Task Force on Occupational Injury and Illness Surveillance and Intervention, Occupational Safety and Health in Massachusetts - The Need For Surveillance 4 (1989).



the United States.[16/] At least 50 substances in common industrial use are known or suspected reproductive hazards based on human or animal data, [17/] yet only three are federally regulated by OSHA based partially on reproductive

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16/ Centers for Disease Control, Leading Work-Related Diseases and Injuries - United States, 34 Morbidity and Mortality Weekly Report 537, 538 (1985) [hereinafter CDC]

17/ CDC, supra note 16, at 537. Reproductive workplace hazards include a wide range of substances, including lead, ethylene oxide, dibromochloropropane (DBCP), organic and inorganic mercury, ionizing, radiation, anesthetic gases, alkylating agents, glycol ethers, carbon disulfide, and infectious agents which can cause intrauterine infections. Daniels, Paul & Rosofsky, Family, Work and Health, 21-22 (1988) (issued by Mass. Dep't of Public Health); Occupational Health 310-312 (B. Levy & D. Wegman eds. 1983); Office of Technology Assessment, U.S. Congress, Reproductive Health Hazards in the Workplace, OTA-BA-266 (1986) [hereinafter Reproductive Health Hazards] at 85-86. Glycol ethers have

(footnote continued)

effects.[18]

As the above data suggest, reproductive workplace hazards affect both men and women. Indeed, OSHA, which regulates lead,

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(footnote continued)

been shown to be teratogenic in animal studies and toxic to sperm in human and animal studies. Daniels et al., supra at 20. An estimated 200,000 workers are potentially exposed to glycol ethers. CDC, supra note 16, at 538. Studies have shown that paternal exposure to anesthetic gases is strongly associated with an increased rate of congenital abnormalities, while maternal exposure is strongly associated with an increased spontaneous abortion rate. Occupational Health, supra at 310. Alkylating agents used in cancer chemotherapy have been shown to produce permanent sterility. Id. at 312. Ethylene oxide, used in medicine and industry, causes testicular damage and impaired fertility, according to animal studies. Reproductive Health Hazards, supra, at 85-86.

18/ These are lead, ethylene oxide, and dibromochloropropane (DBCP). 29

(Footnote continued)



dibromochloropropane (DBCP) and ethylene oxide partially on the basis of their reproductive effects, regulates these substances in a gender-neutral way.[19] Although research conducted thus far has largely ignored the effects of many substances on men's reproductive systems and on reproductive effects traceable to the operation of men's reproductive systems (e.g., the operation of defective

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(footnote continued)

C.F.R. §1910.1025 (1989)(lead regulations); 29 C.F.R. §1910.1047 (1989)(ethylene oxide regulations); and 29 C.F.R. §1910.1044 (1989)(DBCP regulations).

19/ See, 29 C.F.R. §1910.1044 (1989), 29 C.F.R. §1010.1047 (1989), 29 C.F.R. §1910.1025 (1989).

sperm),[20/] the states are concerned that "fetal protection" policies which focus only on removing women from contact with a particular hazard ignore the health risks to men and their offspring and reduce employer incentive to find alternatives to dangerous chemicals. The states have a strong interest in protecting all of their citizens by removing reproductive and other hazards from the workplace.[21/]

## SUMMARY OF ARGUMENT

Johnson Controls' "fetal

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20/ Occupational Health, supra note 17 at 307, Becker, supra note 7 at 1236-7; Reproductive Health Hazards, supra note 17 at 16-17; Needleman & Bellinger, Commentary, 46 Env. Research 190-191 (1988).

21/ States also lose revenue as a result of occupational disease.

(footnote continued)



protection" policy constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Because Johnson Controls' policy is facially discriminatory, the only defense it can assert is that sex is a bona fide occupational qualification ("BFOQ"). A "fetal protection" policy, however, cannot be justified as a BFOQ because fertile women can unquestionably

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(footnote continued)

According to a national survey, $11.4 billion in income was lost in 1978 because of disabling occupational illness. Massive wage loss of course reduces tax revenues. Conversely, welfare costs, funded in part by the states, rise on account of workplace hazards. Welfare currently provides 16% of the funds replacing income lost by individuals disabled from occupational disease. U.S. Dep't of Labor, An Interim Report to Congress on Occupational Diseases 2 (1980).

perform the jobs at issue and because the protection of possible fetuses is not the essence of a battery manufacturer's business within the meaning of Title VII.

Moreover, Johnson Controls' policy is not justified on the grounds of public health. First, the exclusion of virtually all women from a wide category of jobs contributes to a gender-stratified workforce and undermines the economic and social well-being of women and their families. Second, such policies ignore workplace reproductive hazards to men and operate as a disincentive to cleaning up the workplace. The Court should therefore reverse the judgment of the court below and either remand for further proceedings or direct the



entry of a judgment for the petitioners.

## ARGUMENT

### I. JOHNSON CONTROLS' "FETAL PROTECTION" POLICY CANNOT BE JUSTIFIED AS A BFOQ UNDER TITLE VII.

Johnson Controls' "fetal protection" policy on its face constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964,[22/] as it explicitly excludes all fertile women from a broad range of jobs. Intern. Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 876-7 (7th Cir. 1989).

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22/ 42 U.S.C. §2000e, et seq., as amended in 1978 to provide that unlawful sex discrimination includes discrimination on the basis of "pregnancy, childbirth, and related medical conditions." Pregnancy Discrimination Act, Pub.L. No. 95-555, §1, 92 Stat. 2076, (codified at 42 U.S.C. § 2000e(k)).

Because Johnson Controls' policy is facially discriminatory, the only defense it can assert is that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1).[23/] The BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). The BFOQ is a narrow defense precisely because the purpose of Title VII is to outlaw the assumptions and stereotypes that kept women from equal employment opportunity. Id. at 333-4, nn. 18, 19; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).[24/] The burden of proof for a BFOQ is on the employer: "[A]n employer [can]

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23/ The states thus agree with the Equal Employment Opportunity Commission (EEOC) that a defendant "in a case challenging a facially discriminatory fetal protection policy [should be allowed] only the statutory defense that sex is bona fide occupational qualification." EEOC Policy Guidance on Seventh Circuit Decision in United Auto Workers v. Johnson Controls, Inc., 2 EEOC Compl. Man. (CCH) ¶4319 (Jan. 26, 1990) [hereinafter EEOC Policy Guidance]. See, Ariz. Governing Com. v. Norris, 463 U.S. 1073, 1084 n. 13 (1983). But even if this Court were

(footnote continued)



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to permit application of the business necessity defense to explicit sex discrimination, Johnson Controls' policy cannot be justified, as the states demonstrate below.

24/ The EEOC has stated that in the context of a fetal protection policy, the BFOQ defense "should be read narrowly." EEOC Policy Guidance, supra note 23, at D-3. Employment decisions regarding women based on "stereotyped characterizations of the sexes" or

(footnote continued)

rely on the BFOQ exception only by proving 'that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" Id., quoting Weeks, 408 F.2d at 235. The employer must demonstrate that "the essence of the business operation would be undermined by not hiring members of one sex exclusively," Dothard, 433 U.S. 321, 333, quoting Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (emphasis in original).

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(footnote continued)

"assumptions of the comparative employment characteristics of women in general" do not warrant application of the BFOQ defense. 29 C.F.R. § 1604.2(a)(1)(i),(ii) (1989).



Johnson Controls' "fetal protection" policy cannot withstand the test for a BFOQ. First, it does not exclude "all or substantially all women" from allegedly hazardous areas, and it excludes women from areas that are admittedly non-hazardous. Women already working in allegedly hazardous areas and women who prove their sterility can remain in those areas, 886 F.2d 871, 876. At the same time, all fertile women are excluded from a range of completely lead-free environments. Id. at 877. Thus, Johnson Controls' policy is both too broad and too narrow to be justified as a BFOQ.

More importantly, however, Johnson Controls did not and cannot establish that its wholesale exclusion of women

is necessary to "the essence of [its] business operation." Dothard, 433 U.S. at 333. The Pregnancy Discrimination Act and regulations promulgated pursuant thereto make clear that the differing reproductive functions of women and men are not a legal basis for engaging in sex discrimination, and that the only factor involved in employment decisions regarding pregnant employees is their ability or inability to work.[25/] If fertile women could not perform the job for some reason

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25/ The regulations state that the pregnant "employee must be permitted to work at all times during pregnancy when she is able to perform the job", and that "an employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job." 29 C.F.R. § 1604.10, app. A8, A12 (1989).



pertaining to their fertility, the employer might establish a BFOQ. But fertile women unquestionably can perform the jobs at issue and exclusion of fertile women in no way is essential to the business of Johnson Controls.[26/]

The court below incorrectly relied on Dothard v. Rawlinson, where the

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26/ Johnson Controls presented no evidence of any litigation or threat of litigation related to lead exposure. Judge Easterbrook noted that the possibility of "tort judgments means only that female employees' average cost to Johnson [Controls] exceeds that of male employees." 886 F.2d at 914. Higher costs of female employees are not a permissible basis for discrimination. Id. See also, Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). In any event, speculative fear of lawsuits can not be used to justify a discriminatory classification. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552-3 n. 15 (11th Cir. 1984).

employer was able to prove that being male was a BFOQ for those assigned to guard male prisoners because "[t]he [female] employee's very womanhood would ... directly undermine her capacity to provide the security that is the essence" of the job responsibilities at issue in the case. 433 U.S. 321, 336. Here, by contrast, an employee's "very womanhood" is entirely unrelated to the manufacture of batteries and does not undermine her ability to perform the job.

In addition, no security or other risk is posed by an employee's "very womanhood" because women make widely varying sexual and reproductive choices. For example, a woman could be involved with a sterile man, could decide not to be sexually active, could



decide not to be heterosexually active, could use birth control, or could decide that if, despite birth control, she became pregnant during a certain period in her life she would obtain an abortion. For women to become equal participants in the workforce with men, this range of reproductive choices must be recognized. Women must not always and only be treated as potentially pregnant.[27/] Title VII forbids employers from adopting exclusionary policies based on outmoded stereotypes and assumptions, as Johnson Controls

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27/ Moreover, Johnson Controls' policy ignores the fact that many fertile women are unlikely to get pregnant. The birth rate for women age forty has been almost zero. In 1986, there was only a 0.41% probability that a woman between 40 and 44 years of age would give birth. Statistical Abstract, supra note 4 at 62.

has done.[28/]

## II. JOHNSON CONTROLS' "FETAL PROTECTION" POLICY IS NOT JUSTIFIED ON GROUNDS OF PUBLIC HEALTH.

Even if this Court were to entertain the notion of expanding the BFOQ defense, or as the court below did, weakening Title VII by permitting a business necessity defense in instances of facial discrimination, Johnson Controls' "fetal protection" policy cannot be justified. First, the exclusion of virtually all women from a wide category of jobs undermines Title VII's goal of equal economic opportunity and exacerbates the economic and health problems of female-headed families, and particularly of children. Second, judicial approval of such exclusionary practices ignores

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28/ Even if a narrowly tailored policy aimed at fetal protection could constitute a BFOQ, summary judgment should not have been granted on the record below. See, EEOC Policy Guidance, supra note 23 at D-3 (requiring employer to prove that there is (1) a substantial risk of harm to offspring through workplace exposure to a hazard; (2) the risk occurs only through the exposure of one sex; (3) its policy minimizes the risk while excluding the narrowest possible group; and (4) there are no reasonable alternatives which are less onerous to women). These burdens were not placed on the employer in this case, and the employer on the record did not satisfy them.

The District Court acknowledged that there was a dispute about material facts: "whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females, as opposed to male workers." Int'l Union, UAW v. Johnson Controls, 680 F.Supp. 309 (E.D. Wis. 1988), aff'd, 866 F.2d 871 (7th Cir. 1989). The record in addition contains disputes among experts on the dangers to fetal health caused by paternal and maternal exposure to lead. At the very least, Johnson Controls did not meet its burden of showing the absence of a

(footnote continued)



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reproductive workplace hazards to men, and operates as a disincentive to cleaning up the workplace in the interests of all citizens.

A. Johnson Controls' Policy Undermines Title VII's Goal of Equal Economic Opportunity

The Johnson Controls policy at issue in this case is extremely broad. It excludes "all women except those whose inability to bear children is medically documented" from all job sites at which either one employee in the past year has had 30 micrograms of lead per deciliter of blood, or in which an air sample of 30 micrograms

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(footnote continued)

material factual dispute on the necessity for a policy so broad that it excludes women from jobs where there is no exposure to lead, 886 F.2d at 877, and applies to women who are not likely to get pregnant.



per cubic meter has been taken in the past year. Int'l Union, UAW v. Johnson Controls, 886 F.2d at 876 n.8. The policy also excludes all fertile women from all jobs that, although not involving exposure to lead, could lead to such exposure "through the exercise of job bidding, bumping, transfer or promotion rights." Id. at 887. The policy thus effectively excludes all women from a broad range of jobs that involve no contact with lead.

Excluding all women from broad categories of jobs limits women's occupational and economic opportunities. If courts permit employers to bar all fertile women, regardless of reproductive choice, from job categories rather than removing hazardous substances, economic

opportunities for women will be dramatically reduced.[29/] Available evidence suggests that so-called fetal protection policies are already having a significant impact on women's employment options. In 1985, the Office of Technology Assessment reported that at least 15 of the Fortune 500 corporations have implemented exclusionary policies that exclude fertile or pregnant women from work allegedly hazardous to reproductive health.[30/] A Massachusetts Public Health survey of chemical and electronics companies found that nearly 20% of responding

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29/ Becker, supra note 7 at 1229-1231.

30/ Reproductive Health Hazards, supra note 17, at 11.



companies excluded workers (almost exclusively women) from certain types of employment based on presumed reproductive health concerns.[31/]

"Fetal protection" policies have been established primarily in industries where women have only recently begun to work or where there is equal competition for jobs from men and women. They are not found in occupations such as nursing and secretarial work, where women are the

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31/ Daniels, et al., supra note 17, at 1. The study found that employers actually knew very little about reproductive hazards and that exclusionary policies often had no relationship to real reproductive risks. Workers were sometimes "protected" from substances that posed no risk to them, while employers were often unaware that other substances in use were hazardous to reproduction. Id. at 1-2.

primary labor force.[32/] For women in or prepared to enter traditionally male-dominated occupations, policies like Johnson Controls' offer them a Hobson's choice: look for another job (often at lower pay) or become sterilized.[33/] The policies thus favor the continued stratification by gender of the labor force, with men in higher-paying jobs and women in lower-paying jobs. This in turn contributes to the poverty and inadequate health care of so many women and female-headed families.

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32/ Becker, supra note 7, at 1230, 1238-1240. Paul, Daniels, Rosofsky, Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work, and Health Survey, 16 Am. J. of Indus. Med. 267, 277 (1989).

33/ See, Ashford & Caldart, The Control of Reproductive Hazards in the Workplace, 5 Ind. Rel. L. J. 523, 535 (1983).



As Judge Easterbrook pointed out in his dissent, excluding women from employment on the basis of risks to potential fetuses is a dangerous principle, with limits that are difficult or impossible to define.

> How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risks of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses?

886 F.2d at 917. The principle at stake here goes beyond the examples used by Judge Easterbrook, because Johnson Controls excludes not just all pregnant women, but all fertile women on the basis of purported risks to a possible embryo conceived so recently that the woman does not realize she is

pregnant. Could employers forbid all fertile women to drive cars in connection with their jobs, because of possible injuries to a potential, recently-conceived embryo, before the woman knows she is pregnant?

Women need jobs as much as men do. Reproductive hazards, rather than women, should be removed from the workplace. "Fetal protection" policies like Johnson Controls' reinforce gender-stratification of the workforce by excluding women from nontraditional jobs and by treating women as if they are essentially reproductive vessels whose employment is nonessential. This is contrary to Congress' express purpose in enacting Title VII and the Pregnancy Discrimination Act, and undermines the goal of full



participation in the workforce free from sex discrimination.

B. Johnson Controls' Policy Undermines, Rather than Promotes, Goals of Workplace Health and Safety.

Men's reproductive systems, as well as women's, are at risk from numerous substances commonly used in workplaces.[34]/ Yet so-called fetal prctection policies ignore risks to men's reproductive health. It is true that research about the effects of many substances on men's reproductive systems and on male-mediated reproductive effects is less developed than that regarding female-mediated

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34/ See, Interests of Amici Curiae, supra at 14-18.

reproductive effects.[35] But there is no biological basis for assuming that women or fetuses are more susceptible to all reproductive hazards than are men.[36]

For example, lead, the very substance at issue in this case, is hazardous to men and men's reproductive systems. OSHA, after an exhaustive study, concluded that male exposure to lead can cause:

> a decrease in sexual drive, impotence, decreased ability to produce healthy sperm, and sterility. Malformed sperm (teratospermia), decreased number

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35/ Occupational Health, supra note 17 at 307; Reproductive Health Hazards, supra note 17, at 16-17; Needleman & Bellinger, supra note 20 at 190.

36/ Reproductive Health Hazards, supra note 17, at 68.



> of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur...Germ cells can be affected by lead and cause genetic damage to the egg or sperm.

29 C.F.R. § 1910.1025, app. C, II(5) (1989).[37] At the levels at which Johnson Controls permits men to be exposed to lead, which are the OSHA

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37/ OSHA found that: "lead has profoundly adverse effects on the reproductive ability of male and female workers in the lead industry...Lead exerts its effects prior to conception through genetic damage (germ cell alteration), effects on menstrual, and ovarian cycles and decreased fertility in women, decreased libido and decreased fertility in men through altered spermatogenesis...Following birth the child of lead exposed parents may exhibit birth defects, neurological damage and the chances of death within the first year may be increased." 43 Fed. Reg. 52,960 (November 14, 1978). See, United Steelworkers of America v. Marshall, 647 F.2d 1189, 1257 (D.C.Cir. 1980), cert. denied 453 U.S. 913 (1981). See generally, Reproductive Health Hazards, supra note 17, at 67-70.

levels, reproductive hazards to men have been shown.[38] Yet Johnson Controls' policy does not restrict men's exposure to lead to the extent that it restricts women's exposure.

Similarly, while glycol ethers have been shown in human and animal studies to be toxic to sperm, and human exposure has been estimated at 200,000, employers surveyed have restricted certain women, but not men, from contact with these substances.[39] The survey evidence also reveals that females, but not males, are prohibited

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38/ Asthenospermia, for example, has been found at exposure levels of 41 micrograms/100 grams, while medical removal under the OSHA standard occurs at 50 micrograms. 29 C.F.R. § 1910.1025, II.5 (1989).

39/ CDC, supra note 16, at 538, Daniels, et al., supra note 17, at 20, 40.



from holding jobs that may put them in contact with mercury, which is a hazard to both men's and women's reproductive systems.[40]

While empirical evidence is limited, it appears that men, through a combination of circumstances including limited research and employer ignorance, are not protected adequately from reproductive hazards. Apparently where employers consider some substances hazardous to reproductive health and decide to institute stricter policies than those required by OSHA, they preclude only females from having contact with the substances, while men

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40/ Daniels, et al., supra note 17, at 20, 31.

are not similarly protected.[41/]

Furthermore, "fetal protection" policies reduce employer incentives to clean up workplaces, and to develop alternative materials or methods by permitting employers to remove women workers instead.[42/] The OSHA response, by contrast (and the response

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41/ Id. at 40. By contrast, in 1977 when DBCP, which was used both on crops and ornamental plants, was discovered by production workers to be toxic to sperm, men were not removed from jobs involving production or application of DBCP. Instead, OSHA issued an emergency standard protecting workers and the chemical was banned in the continental United States within four years. Occupational Health, supra note 17 at 310: Reproductive Health Hazards, supra note 17, at 199-200; Bureau of National Affairs, Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety, 69-70 (1987).

42/ See, Ashford, Policy Considerations for Human Monitoring in the Workplace, 28 J. Occup. Med. 563, 565 (1986).



of many states), has been to regulate hazards in a gender-neutral fashion. A wide range of measures are available to employers seeking to lower workers' exposure to lead,[43/] but Johnson Controls instead chose to bar virtually all women from employment in relatively high-paying, traditionally male jobs. The Court should not permit these gender-based patterns to continue.

In summary, "fetal protection" policies, particularly those as sweeping and overbroad as the one at issue here, cannot be justified on the basis of public health, for they ignore reproductive risks to men, operate as a disincentive to workplace cleanup, and

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43/ See, Bullock, Lead-Acid Battery Manufacturing, in 3 Industrial Hygiene Aspects of Plant Operations 599-633 (L.V.Cralley & L.J.Cralley, eds. 1985).

force women and their children into poorer economic situations which, as amici have discussed in their statement of interest, in turn have a host of adverse health consequences. As Judge Cudahy asked in his dissent,

> What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk?

886 F.2d at 902. In fact, according to the National Center for Children in Poverty, children of the former group are at greater risk of impaired health than other children.[44/]

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44/ Ironically, poor children are at greater risk of harm from exposure to lead, the substance of concern to Johnson Controls. Poor children are exposed to higher doses of lead in their environments than are other

(footnote continued)



Removing all fertile women workers from jobs with possible lead exposure is not an acceptable solution to the problem of exposure to lead of pregnant women. Rather, the answer is to ensure that all workers, female and male, have comprehensive information and training concerning the risks of exposure to lead and other toxic substances, in order to minimize the possibility that parents will conceive and bear children who are harmed by their parents' workplace chemical exposure.

The Court below appeared to interpret the fact that between 1979 and 1983 at least six women became

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(footnote continued)

children, and the average blood concentration of lead among children from six months to five years increases as the family income decreases. Five Million Children, supra note 7 at 51, 54.

pregnant while working at Johnson Controls as evidence of women's lack of responsibility regarding the risk to their children's health, stating "..it would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure." 866 F.2d at 897.[45/] As Judge Posner noted in his dissent, however, during

45/ At oral argument, Johnson Controls presented a defense to their policy that the company is "morally required to protect children from their parents' mistakes." 866 F.2d at 912, (Easterbrook, J., dissenting). As Judge Easterbrook noted, however: "No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of the living woman, and that the only acceptable level of risk is zero." 866 F.2d at 913.



that period of time, the company did not provide adequate information to its workers concerning the risk of lead exposure; rather, it gave a warning which "...was one more likely to allay than to arouse concern." 886 F.2d at 907. Employers are now required to provide their workers comprehensive information concerning reproductive hazards. [46/]

46/ Under the federal hazard communication standard promulgated by OSHA in 1983, employers must provide training and information to their employees on workplace reproductive hazards. 29 C.F.R. § 1910.1200, 1200(c)(1989). Even before the hazard communication standard was promulgated by OSHA, states throughout the country had enacted "right to know" laws, evidencing the concern of the states for the potential health impacts of toxic chemical exposure to workers and their children. By 1985, 25 states had such laws. Bureau of National Affairs, Right-to-Know: A Regulatory Update on Providing Chemical Hazard Information (1985). Although state right to know

(footnote continued)

If employers comply with the law, both male and female workers who are considering parenting will now be in a position to make informed choices to guard the health of their children. Undoubtedly most will decide not to parent while they are exposed to toxic chemicals which could harm their children. In those situations where workers do wish, nonetheless, to parent, they should have a right to request a reasonable accommodation if they are planning to conceive or bear

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(footnote continued)

laws are now preempted in the private sector by OSHA's hazard communication standard, U.S. Steelworkers v. Auchter, 763 F.2d 728 (3d Cir. 1985), workers in all states are now entitled to information and training under the federal standard.



children.[47/] Such a reasonable accommodation duty might be the best means to accomplish the twin goals of protecting the health of workers and their children, and of securing equal economic opportunity. With such requirements, an employer has an incentive to remove reproductive hazards from workplaces. At the same time, the goal of economic equality

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47/ Such accommodation could consist of transfer to a job not having contact with the material, or provision of special protective gear. Where no on-the-job accommodation is possible, a temporary leave with retention of benefits might be called for.

This concept has a precedent in the OSHA lead regulations which provide that an employee who desires advice "regarding lead exposure and the ability to procreate a healthy child" has a right to a medical examination, and state that the examining doctor can "tailor special protective procedures to the needs of individual employees," including special needs of pregnant employees. 29 C.F.R. § 1910.1025 app. C pp. 179, 182 (1989).

between the sexes would be furthered, as women would be able to participate in the workplace equally with men.

## CONCLUSION

The Johnson Controls policy at issue in this case, and policies like it, are harmful to the states' interest in the economic well-being of women and children. Sex discrimination, particularly on this scale, undermines women's economic and social status and contributes to a gender-stratified workforce. Broad exclusions of women from jobs they need also harm the states' interest in workplace health by failing to protect men's reproductive systems, and by eliminating employer incentives to remove hazards from the job site.



It contravenes the goals of Title VII for employers to exclude fertile women from jobs they are able to perform. And contrary to Johnson Controls' contention, its "fetal protection" policy is not justified under the BFOQ defense. Nor does the policy promote public health. At the very least, summary judgment should not have been granted for the defendant on this record. Amici states therefore urge this Court to reverse the judgment of the court below and either remand for further proceedings or direct the entry of a judgment for the petitioners.

Respectfully submitted,

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